

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NATHEN W. BARTON,

Plaintiff,

v.

SERVE ALL HELP ALL, INC.,

Defendant.

CASE NO. C21-5338BHS

ORDER

THIS MATTER is before the Court on Defendant Serve All Help All, Inc.’s (“SAHA”) Amended Motion to Dismiss for Failure to State a Claim, Dkt. 7. The case involves pro se Plaintiff Nathan Barton’s claim that SAHA violated the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227(c)(5), when it made a “robocall” to his cell phone to offer mortgage foreclosure avoidance advice. Dkt. 1.

SAHA seeks dismissal under Federal Rule of Civil Procedure 12(b)(6), arguing that Barton has failed to plausibly allege that the call was placed using an automatic telephone dialing system (“ATDS”). It argues that its call was not made for marketing purposes and was instead a charitable offer of assistance or an emergency call exempt from the TCPA. Dkt. 7. It filed the motion on June 30, 2021.

1 On July 8, 2021, Barton filed an Amended Complaint, Dkt. 8, and responded to
2 the Motion to Dismiss, Dkt. 9. Barton timely and properly filed his amended complaint as
3 a matter of course within 21 days of SAHA's Rule 12(b)(6) motion. *See* Fed. R. Civ. P.
4 15(a)(1)(B). SAHA has not filed a reply or withdrawn its motion to dismiss.

5 An amended complaint properly filed while a motion to dismiss is pending
6 generally moots the motion to dismiss. *See, e.g., Williamson v. Sacramento Mortg., Inc.*,
7 No. S-10-2600KJM-DAD, 2011 WL 4591098, at *1, (E.D. Cal., October 11, 2011)
8 (internal citations omitted). An "amended complaint supersedes the original, the latter
9 being treated thereafter as non-existent." *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474
10 (9th Cir. 1997) (internal citation omitted), *overruled on other grounds by Lacey v.*
11 *Maricopa Cnty.*, 693 F.3d 896, 927–28 (9th Cir. 2012). Where a motion to dismiss targets
12 a complaint that has been superseded by an amended complaint, the court should deem
13 the motion to dismiss moot. *Ramirez v. Cnty. of San Bernardino*, 806 F.3d 1002, 1008
14 (9th Cir. 2015).

15 SAHA's motion to dismiss, Dkt. 7, was mooted by Barton's Amended Complaint,
16 Dkt. 8, and it is therefore **DENIED without prejudice**. SAHA may file a renewed
17 motion to dismiss aimed at Barton's amended complaint, but it is reminded that a Rule
18 12(b)(6) motion tests the plausibility of the plaintiff's allegations, not the sufficiency of
19 his evidence.

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1 **IT IS SO ORDERED.**

2 Dated this 24th day of August, 2021.

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5 BENJAMIN H. SETTLE
6 United States District Judge
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